UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,	20-CR-00305(LDH)
-against-	United States Courthouse Brooklyn, New York
	Friday, September 16, 2022
JORDAN, et al.,	9:00 a.m.
Defendants.	

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TRANSCRIPT OF CRIMINAL CAUSE FOR STATUS CONFERENCE
BEFORE THE HONORABLE LaSHANN DeARCY HALL
UNITED STATES DISTRICT JUDGE

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(In open court.)

THE COURTROOM DEPUTY: All rise.

(Judge LaSHANN DeARCY HALL entered the courtroom.)

THE COURTROOM DEPUTY: Criminal cause for a status conference in the United States versus Jordan, et al., case number 20-CR-305.

Counsel, please state your appearances for the record.

MR. McCONNELL: Your Honor, good morning.

Artie McConnell and Mark Misorek for the United States.

THE COURT: Good morning.

MR. HUESTON: Good morning, Your Honor.

Michael Hueston for Karl Jordan. Mr. Jordan is here.

(Defendant entered courtroom.)

THE COURT: Good morning.

MS. KELLMAN: Good morning, Your Honor.

Susan Kellman and my client is present on the monitor.

THE COURT: All right, good morning.

You all can be seated.

All right, so before we start with dealing with the substance of this proceeding, Ms. Kellman, as you noted, your client is present on the monitor, which I allowed based on the

representations in your letter. But, quite candidly, I am not altogether clear why your client is on the monitor and not present, and whether this is an ongoing issue that I am going to need to explore more fully because, as you might imagine, it shouldn't be the expectation that this is how we're going to proceed in the normal course.

MS. KELLMAN: Of course.

THE COURT: So, if you want to speak to that, I'll hear from you. I am just trying to get a sense of, and I know this sounds crazy, but is there a way, Jordan, I don't want to look at myself this whole time. Can we set that screen off? Just get rid of it, minimize it, just minimize the whole thing. It's a little distracting. Thank you.

Ms. Kellman, please. Thank you.

MS. KELLMAN: Yes, Your Honor.

I would say, Your Honor might have a better idea of what's happening if we could really see my client. But he has lost, I would say, 40, 50 pounds. His waist to me looks like it's a 27.

THE COURT: Has he sought and received medical attention?

MS. KELLMAN: Sought, yes.

THE COURT: He has not received any medical attention?

MS. KELLMAN: That's what he says. Now, he

explained to me, Judge, that the last time we were here Your Honor said that you were going to reach out to the facility. And he thinks that as a result of your reaching out, he began to get medical care, but --

THE COURT: Okay, that's a good thing.

MS. KELLMAN: Yes, that's a good thing.

But everybody seemed to agree, at least so he's told me, they won't talk to me about it, but everybody seemed to agree that he needed an MRI.

THE COURT: Okay.

MS. KELLMAN: And he says they've scheduled it several times, but canceled it every time.

THE COURT: All right.

MS. KELLMAN: And just to see him physically, he has so much difficulty walking.

THE COURT: Okay, well, clearly, we need to get to the bottom of this. And what my preference would be is to have court intervention in advance, so that if there was a problem with the MRIs, because the full import of any order or any directive from me is that he actually receive all of the medical attention that he needs, not simply an assessment of the medical attention.

So, I am going to issue another order and I am going to expect that the Government is going to serve as a liaison so that I can get whatever information I need. Principally,

and first and foremost, he needs to get medical attention. If an MRI is needed, we need to figure out what's wrong and make sure that he gets the treatment that he needs. And then once that happens, we can have, not that this is disruptive, but it's not my preference, we can then proceed --

MS. KELLMAN: Of course, Judge, it's not my preference either.

THE COURT: Right.

MS. KELLMAN: I'd much rather have my client sitting next to me.

THE COURT: So, prepare an order for me.

MS. KELLMAN: I will do that.

THE COURT: For me to sign. I started to say to counsel, because there are a number of orders like this that I have had to issue, unfortunately, of late, as you can imagine.

MS. KELLMAN: I drafted three in the last month, Judge.

THE COURT: Right. Make sure you keep any hyperbole out. My order is not a basis for a 1983 claim.

MS. KELLMAN: I understand, Judge.

THE COURT: All right, thank you.

All right, now let's move on to the matters at hand.

As the parties are aware, there are pending motions before this Court. I had promised you all an opinion with respect to the motion to dismiss and motion to sever, which I

have not posted to the docket.

The opinion is drafted. I am going to tell you now the conclusions that the Court has drawn. Then I am going to ask counsel to approach for a sidebar.

Fair enough?

MS. KELLMAN: Yes, Judge.

THE COURT: With respect to the motion to dismiss, it is denied.

With respect to the motion to sever, Counts One and Two from Counts Three through Eleven, it is granted.

The motion to sever defendants as to Count One and Two is denied.

Counsel, approach.

(Sidebar held.)

(The following sidebar took place outside the hearing of the public.)

THE COURT: So, the reason why this is has not been posted to the docket is because there is a section of the opinion which I have highlighted.

If you all could turn to pages 6 and 7 of the opinion.

So, you'll see pages 6 and 7 address specifically certain issues concerning certain witnesses in this case. There was some discussion in the -- one of the defendant's submissions that talked a little bit more generally about

these witnesses, and my question is before I post it, if you all feel it's necessary for this section to be redacted.

MR. McCONNELL: Yes.

MR. MISOREK: Yes.

MR. McCONNELL: We feel very strongly about that, Judge. Thank you for allowing us to weigh in.

THE COURT: Yes.

So, take a look at this. I think these are kind of proposed redactions. In essence, it's a lot, but I need you guys to look at pages 6 and 7, make a decision, let me know if you think those are the appropriate redactions before this is posted.

(Pause.)

MR. McCONNELL: It's really the witness names that we're most concerned about, and I think you've got it covered.

THE COURT: Okay.

I don't see any others, do you?

MR. MISOREK: I think that's good. I think that's good.

MR. McCONNELL: Yes.

THE COURT: All right.

MR. MISOREK: Thank you.

MS. KELLMAN: Thanks.

THE COURT: All right, you all can have that.

MR. HUESTON: Thanks, Judge.

MS. KELLMAN: Thank you, Judge.

THE COURT: But I trust that you all will handle that as is appropriate, so that the information is not publicly disseminated, defeating the --

MS. KELLMAN: The purpose.

THE COURT: Thank you.

MS. KELLMAN: No worries, Judge.

(Sidebar concluded.)

(In open court.)

THE COURT: All right, so expect the Court's opinion to be posted to the docket with respect to the motion to dismiss and the motion to sever today.

All right, in addition to the motion to dismiss and the motion to sever, the Court also had under consideration the motions to suppress made by Mr. Jordan. Specifically, Mr. Jordan sought to suppress data collected from two cellular telephones found on his person, a black LG Model XM320TA and a white iPhone, and the motion is made pursuant to the Fourth Amendment, as well as Mr. Jordan seeks to suppress all post-arrest statements pursuant to the Fifth Amendment.

I am going to address each of these arguments and make a determination on the motion to suppress from the bench.

Now, the Fourth Amendment protects persons, houses, papers, and effects against unreasonable searches and seizures. The Government can conduct, however, a search upon

probable cause supported by oath or affirmation. Now, affidavits establishing probable cause in support of a warrant for search enjoy what is called a presumption of validity. Now, upon a motion challenging a warrant for lack of probable cause, the reviewing court must give substantial deference to the magistrate's probable cause determination.

Now, critically, the Supreme Court has long held that after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of de novo review. The defendant seeking an evidentiary hearing to challenge a search warrant affidavit must make a substantial preliminary showing that, one, the claimed inaccuracies or omissions are the result of the affiant's deliberate falsehood or reckless disregard for the truth; and, two, the alleged falsehoods or omissions were necessary to the judge's probable cause finding.

The challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. Rather, it must be accompanied by an offer of proof, such as affidavits or sworn or otherwise reliable statements of witnesses. The absence of such statements must be satisfactorily explained.

Now, in this case Mr. Jordan argues that the affiant supporting the search warrant displayed a reckless disregard for the truth, which requires him to present credible and

probative evidence that the purported omission was designed to mislead or was made in reckless disregard of whether it would mislead.

Now, Mr. Jordan must demonstrate that the affiant entertained serious doubts as to the truth of his or her allegations. Now, proving reckless disregard for the truth based on an omission, again as Jordan seeks to do here, is less likely to justify suppression than claims of intentionally or recklessly false assertions. And that is because an affiant cannot be expected to include in an affidavit every piece of information gathered in the course of an investigation.

An omission is material only if the omitted facts cast doubt on the existence of probable cause, which is determined by considering the omitted information and the information in the affidavit as a whole.

The ultimate inquiry is whether after correcting material omissions there remains a residue of independent and lawful information sufficient to support a finding of probable cause or necessity.

Now, against this backdrop Mr. Jordan argues that the cell phone data in this case should be expressed or the Court should hold a *Franks* hearing because the affiant knew a witness relied upon for probable cause was not reliable, but neglected to include any references to the witness's

credibility in the warrant affidavits. Jordan contends that the affiant did not offer any information to the magistrate judge to corroborate the witness's testimony, and had the affiant included information implicating the witness's lack of credibility, including what led to the witness's change in the witness's statement during the course of the interview, the portion of the affidavits referencing the witness's statements would fail.

The Court finds that Jordan has failed to make a substantial preliminary showing that the affiant in this case omitted information material to the probable cause determination or that the affiant entertained serious doubts about the accuracy of the affidavit in light of the alleged omission. In fact, I find that Mr. Jordan makes no showing at all. His application to this Court was completely unsupported and it does not offer any sort of proffer.

I will note that in nearly every case that Mr. Jordan cited to the Court, the defendant, in fact, presented evidence other than the warrant affidavits to support the factual allegations. And in the one case where the defendant did not provide evidence to the Court in those cased cited by Mr. Jordan, the Government had conceded the falsity of the information at issue.

So, here what I have is simply conclusions that are made by Mr. Jordan concerning, one, the credibility of the

witness; and, as well, the affiant's purported belief that the witness lacked credibility.

Rather than identify with specificity what the affiant omitted and explain how it was material, Mr. Jordan asserts instead that the affiant omitted what actually led the witness to change their statement as to the timing of the narcotics activity. He provides no legal authority demonstrating that the information is material, such that -- or per se material, such that in all circumstances it must be included in a warrant affidavit.

Now, certainly Mr. Jordan contends that recklessness may be inferred when omitted information was clearly critical to assessing the legality of a search, but he fails to establish the circumstances that led the witness to changing their story is clearly critical. Mr. Jordan claims that the affiant failed to offer information to corroborate what the witness said about Jordan's involvement in the sale and distribution of drugs through 2020, but he ignores that this information is not required because the witness's voracity was corroborated in material respects, such that the entire account may be credited, including parts without corroboration.

The affiant described the strong basis for the witness's knowledge and how the affiant vetted and found corroboration for that knowledge.

Ultimately, in the absence of any evidence proffered by Mr. Jordan in this case, he has failed to establish a Fourth Amendment violation, or the need for a suppression hearing. Mr. Jordan's motion to suppress the cell phone data, or in the alternative for the Court to hold a hearing, is denied.

Turning to the post-arrest statements. Mr. Jordan seeks to suppress statements made after his arrest on August 6th, 2020. Now, statements made during a custodial interrogation are inadmissible at trial unless the prosecution can establish that the accused, in fact, knowingly and voluntarily waived his or her *Miranda* rights when making the statements. Now a *Miranda* waiver is made knowingly and intelligently when it is made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.

That is, the defendant must understand that he had the right to remain silent and that anything he said could be used as evidence against him.

Again, I am going to articulate what the right is, that he understand that he had the right to remain silent and that anything he said could be used as evidence against him.

Now, a *Miranda* waiver is made voluntarily when it is the product of a free and deliberate choice, rather than intimidation, coercion, or deception.

Now, to establish deception, as Mr. Jordan attempts to do here, defendant must produce clear and convincing evidence that the agents affirmatively misled him as to the true nature of their investigation. That is, the agents must have made clear they were engaged in a criminal inquiry and cannot have otherwise made affirmative misrepresentations concerning the purpose of that inquiry.

Of course, a valid waiver does not require that an individual be informed of all information useful in making his decision or all information that might affect his decision to confess. And that is citing Supreme Court decision, and it's Colorado v. Spring, 479 U.S. 564.

Now, the Supreme Court has never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights, and a suspect's awareness of all the possible subjects of questioning in advance of interrogation is not relevant to determining whether a suspect voluntarily, knowingly and intelligently waived his Fifth Amendment privilege.

Here , Mr. Jordan argues that he didn't knowingly and intelligently waive his *Miranda* rights because the ATF agents who interviewed him did not tell him that he had been charged with Mr. Mizell's murder prior to the waiver. This argument fails. While knowledge of the charges might affect

the wisdom of a *Miranda* waiver, it could not affect Mr. Jordan's understanding of his right to remain silent and that anything he said could be used as evidence against him. Indeed, the interview reflects this because as Mr. Jordan, himself, notes, he ended the interview soon after the agents advised him of those charges.

Moreover, the agents did not limit their *Miranda* warning to Mr. Jordan's statements that they could only be used against him in a trial concerning his drug charges. Instead, the *Miranda* warnings that were given to Mr. Jordan were rightfully unqualified.

Mr. Jordan answered the questions about Mr. Mizell's murder and he was aware that his responses at the time could be used against him, as well as the fact that he could remain silent.

Mr. Jordan also argues in his reply that his waiver was involuntary due to the agent's failure to advise him of the murder charge, but he ignores that the agents were under no obligation to affirmatively disclose the subject of the interrogation. He makes no showing that the ATF agents had a legal or moral duty to speak or their silence was misleading.

Mr. Jordan makes a kind of passing assertion concerning a Sixth Amendment entitlement to the knowledge of all the charges prior to waiving his Fifth Amendment rights, but he provides no legal authority to support his

interpretation of the law in that way with respect to the Constitution. And the Court is not aware of any authority that might support Mr. Jordan's interpretation as it relates to his Sixth Amendment assertion.

Mr. Jordan attempts to distinguish Colorado v. Spring by arguing that the ATF agents there withheld a central point of the agent's orchestrated interrogation and that the information was, quote, central to guilt or innocence, but this misunderstands the waiver inquiry. The Supreme Court in Colorado v. Spring focused not on whether the information withheld was central to the interrogation or the defendant's guilt or innocence, but rather on whether the agent's silence as to the interrogation topics affected the defendant's ability to understand his right to remain silent and whether the conduct amounted to the defendant's will being overborne or his capacity for self-determination impaired. The Court found neither.

The same is true in Moran v. Burbine, the case relied upon in Spring that Jordan argues is distinguishable. As in Spring, the Court's focus in Burbine was on whether the defendant understood his rights and whether he voluntarily waived them.

As in Spring, the Court in Burbine acknowledged that the information withheld might have affected the defendant's decision to confess, but held that the Constitution does not

require that the police supply a suspect with a flow of information, again, to help him calibrate his self-interest in deciding whether to speak or stand by his rights.

As long as Mr. Jordan understood that he had the right to remain silent and that anything he said may be used against him before he spoke, his waiver here was voluntary, intelligent, and knowingly made. I find it was. Mr. Jordan's motion to suppress his post-arrest statements is denied.

All right, that resolves, I believe, all of the pending motions that the Court has before it.

The parties in this case will now have to, I assume, adjust to the Court's determination with respect to the severance.

We have a trial date scheduled for February 23rd. My intent is to proceed on the murder trial on February 23rd, with the drug charges to follow in a separate trial at a later date.

All right, let me see. There is currently a briefing schedule, I believe, for motions in limine due October 19th; responses due October 26th; jury materials, et cetera, to follow on October 26th; and a witness list on November 2nd. And then we will proceed to a final pretrial conference on the 13th.

I suspect it would go without saying, but obviously I want you all to limit any motions in limine only to the

motions in limine that would pertain to the trial that is now going to go forward in February. Let's save ourselves some unnecessary work with respect to motions in limine related to the narcotics conspiracy of 2016, I think.

That's what I have. Now, I'd like to hear from you.

If I could hear from the Government on any of this, please.

MR. McCONNELL: I think you've covered everything, Judge.

In light of the decisions today, we'll obviously be adjusting what we thought our motions in limine would be. We're prepared to stick with the schedule as it stands right now, and we'll continue to confer with defense counsel as we have been through the pendency of the case.

THE COURT: All right.

Can I hear from the defense, please?

MR. HUESTON: Yes, Your Honor.

I don't really have anything to add, so I'll just be short.

The schedule seems fine.

I did want to raise a medical issue with respect to my client. I've been informed today by Mr. Jordan, he's asked me to tell the Court about this. He has a tear in his right knee. I'm going to look into it and I'll follow-up with the Court, but I did want to alert you about this issue. He's

made several copouts and there's been no action.

THE COURT: Forgive me, I don't know your lingo.

MR. HUESTON: Oh, copouts. The copouts, basically requests to the prison saying give me treatment, give me help. So, that's the copout, Judge. So he's asked for medical attention.

THE COURT: I'm really curious about the etymology of that word, but okay, thank you.

MR. HUESTON: So, I am going to look into it and, obviously, I'll reach out to the Court and the Government, but I'm going to look into it before I bring the matter to you.

THE COURT: That's fine.

Listen, there is no question and I would be disingenuous if I tried to pretend that there hasn't been an issue concerning the provision of medical treatment to those held in custody at the MDC.

So, whatever the Court can do to facilitate ensuring that any defendant before me gets the medical treatment that they need, do not hesitate to contact me.

MR. HUESTON: Thank you, appreciate that.

THE COURT: All right.

Ms. Kellman.

MS. KELLMAN: Your Honor, nothing to add. I will prepare that order and get it to the Court.

THE COURT: All right.

Let's talk about the next status. Obviously, you all are going to be marching towards the preparation of trial. I don't anticipate that much will come up in advance of February, but why don't we do this, let's put a placeholder down for a status conference. If the parties believe that that status conference is unnecessary, you all will have the ability to inform me in advance. And then we can set up a date, perhaps, at that point it will just be simply going to the pretrial conference potentially in February. So, let's do a placeholder.

We are at the end of September; is that right?

THE LAW CLERK: Middle.

THE COURT: We're in the middle of September. Ninety days, folks, it seems to me, instead of making everybody -- unless you all think something is going to come up.

MR. HUESTON: Your Honor, ninety days seems fine to me.

MS. KELLMAN: And we can always reach out to the Court if there's something that we need earlier.

THE COURT: Perfect.

MR. McCONNELL: That's fine for the Government, Judge.

THE COURT: Can I look at your calendar?

(Pause.)

THE COURT: Folks, I am going to set this down for December 16th at the 9:00 a.m.

For those of you who have children who may be on the holiday schedule, I think that just clears it. I suspect it will be the following week.

Is there any obvious conflict from the defense with respect to this schedule?

MS. KELLMAN: No, Your Honor, not on behalf of Mr. Washington.

MR. HUESTON: No, Your Honor.

MR. McCONNELL: It's fine for the Government, Judge.

THE COURT: Do I have an application for an order of excludable delay?

MR. McCONNELL: Yes, Your Honor.

We have our in limine motions due roughly a month from now. In light of that, and in the interest of justice to allow both sides to prepare those motions in light of the Court's decisions today, we would move for an order of excludable delay for the time between now and the December conference.

THE COURT: Is that joined by the defense?

MS. KELLMAN: Yes, Your Honor, on behalf of Mr. Washington.

THE COURT: All right.

MR. HUESTON: We join as well, Your Honor.

THE COURT: All right. The Government's application, which is joined by the defense, for an order of excludable delay until December 16th is granted for the reasons set forth by the Government in its application.

Is there anything else, folks, that I need to address before we adjourn?

MR. McCONNELL: Not for the Government, Your Honor. Thank you very much.

MR. HUESTON: Nothing for us. Thank you, Your Honor.

MS. KELLMAN: Nothing; thank you, Judge.

THE COURT: Mr. Washington, can you hear me?

DEFENDANT WASHINGTON: Yes.

THE COURT: As you heard, your attorney is going to submit a proposed order. I do intend to execute it as you heard.

It is my hope, sir, and certainly I will do everything in my authority, which sometimes is pretty significant, to make sure you get the medical attention that you need.

The same for you, Mr. Jordan.

All right, thank you, all. We're adjourned.

MS. KELLMAN: Thank you, Judge.

(Judge LaSHANN DeARCY HALL exited the courtroom.)

(Matter adjourned.)